Supreme Court, U.S.
FILED
JAN 24 1995

No. 94-1049

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HAROLD A. HOUDEK, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

In its Brief, Respondent Mobil first challenges the timeliness of the petition. The challenge is without merit and should not deflect the Court from the central issue presented.

Mobil opposes the petition on its merits by casting petitioners' case as a "classic ERISA case." Ironically Mobil thereby starkly underscores the need for this Court's review. Because this is a case of wrongful discharge, either *Houdek*, the state court decision below, Pet. at 1a, wrongly finds ERISA preemption, or the Tenth Circuit's decision in *Raymond*, Pet. at 17a, wrongly found no ERISA standing. Petitioners' wrongful discharge from employment is either within the protections of ERISA or outside those protections and beyond ERISA's preemptive reach. Both decisions cannot be right. The employ-

ment relationship is not the focus of ERISA, and its protection under state law should be precluded only where ERISA itself affords protection, as in *Ingersoll-Rand v. McClendon,* 498 U.S. 133 (1990).

This Court should grant certiorari here, and grant leave to file a motion to vacate the denial of certiorari in *Raymond. Houdek* and *Raymond* are two sides of the same coin, as illustrated by *Christopher* (Pet. at 40a) and by Mobil's arguments. Congress did not intend ERISA to create a "gap in actions" for employment discharge, even if there can be a "gap in certain remedies" relating to the benefits aspects of employment regulated by ERISA..

Review in this case is all the more appropriate in light of the Court's recent decision in *American Airlines Inc. v. Wolens* 1995 WL 15047 (01/18/95). In *Wolens,* a state statutory claim was preempted by federal legislation, because the state statute regulated conduct "related to" the "services" of air carriers, namely their selection and design of marketing mechanisms for such services. Meanwhile, a state-law contract claim was not preempted because it depended, not on a limitation upon airlines' conduct imposed by a state or its laws, but on the enforceability of "self imposed undertakings" or the "privately ordered obligations" of the airline, quite apart from its participation in an industry subject to the federal regulation at issue. It was the nature of the state law, not the defendants' conduct, which defined the limitation of federal preemption.

This case represents the other logical dimension of the federal preemption paradigm. Here, the issue is whether the conduct of a company, itself subject to the federal regulation at issue (like American Airlines in *Wolens*), is sufficiently related to that regulation to require preemption or whether the conduct is so remote from the Congressional purpose of regulation and preemption that state laws which would prohibit or regulate the conduct

are not nullified. This case poses the question of whether particular conduct, by its nature, may be regulated by state laws, regardless of the nature of that law, because the regulation of such conduct will not interfere with the federal regulatory regime. In this sense, this case is to *Ingersoll-Rand* what *Wolens* is to *Morales v. Trans World Airlines, Inc.*, 504 U.S. ——, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992).

I. THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED IN THIS COURT.

Mobil's argument that this petition was filed too late is without merit upon the record of proceedings in the Colorado Supreme Court and the precedents of this Court. The petition for writ of certiorari to the Colorado Court of Appeals was filed in this Court on December 13, 1994, less than 90 days after the Colorado Supreme Court's Order, dated September 16, 1994, Pet. at 68a, denying a petition for rehearing. That petition for rehearing was made on September 12, 1994, following the Colorado Supreme Court's August 29, 1994 denial of a petition for certiorari seeking review of the Colorado Court of Appeals' decision at issue here.

Under Colorado Appellate Rule (C.A.R.) 40, the September 12 petition for rehearing was timely filed in the Colorado Supreme Court. *See also* C.A.R. 54. The record reflects that the Colorado Supreme Court exercised its discretion and entertained the petition for rehearing, which consisted of new case law and arguments, and that the court decided the petition on its merits. *See* Pet. at 69a ("Upon consideration of the Petition for Rehearing . . . and now being sufficiently advised in the premises, IT IS THIS DAY ORDERED that said Petition shall be, and same hereby is, DENIED."). *See generally, Ranger Ins. Co. v. District Court*, 647 P.2d 1229, 1231 (Colo. 1982) ("[A] court always retains the inherent power to reconsider a prior ruling as long as the motion is made in a timely fashion.").

Mobil, contrary to this record, submits its own construction of the rules governing the Colorado Supreme Court's discretionary review powers and Mobil's view of what the Colorado Supreme Court did or did not do in this case. It is presumed, however, that the Colorado Supreme Court knows and applies the rules it makes and administers. *See* Colo. Const., Art. VI, Sec. 21 ("The supreme court . . . shall make and promulgate rules governing practice and procedure in civil and criminal cases. . . ."). Cf. *Missouri v. Jenkins*, 495 U.S. 33, 50, 110 S.Ct. 1651, 109 L.Ed.2d 31, 53 (1990) (U.S. Supreme Court "will not assume" that circuit court's action on a petition for rehearing was "not in accord with its regular practice," holding petition for certiorari timely filed).

The Colorado Supreme Court knows the difference between striking papers and considering them on their merits. *Compare Business and Product Promotion, Inc. v. East Tincup, Inc.*, 389 P.2d 851, 853 (Colo. 1964), with *Smith v. Woodall*, 270 P.2d 746, 747 (Colo. 1954). Mobil did not file a motion to strike, or any other objection to, the Petition For Rehearing in the Colorado Supreme Court. Mobil was allowed to make such a motion under C.A.R. 27. If Mobil had done so and if the Colorado court refused to entertain the petition for rehearing, instead of denying it on its merits, petitioners time for filing a petition in this Court would have commenced on August 29, not September 16, 1994.

In any event, it is the action taken by the Colorado Supreme Court which determines the date—here September 16, 1994—90 days after which a petitioner must file for a writ of certiorari in this Court under its Rule 13.1. That date is not determined by the respondent's undisclosed interpretation of the state court's rules or practices.

Moreover, certiorari jurisdiction of the Colorado Supreme Court is wholly discretionary. *See* 6A C.R.S. § 13-2-127; *consider* 6A C.R.S. § 13-4-108 ("Procedures on

writs of certiorari shall be as prescribed by rule of the supreme court."), *with* C.A.R. 56 (Supreme Court may permit petition for certiorari to be filed after expiration of time otherwise provided by the rules). C.A.R. 2 allows Colorado appellate courts to suspend "the requirements or provisions of any of those rules in a particular case on application of a party *or on its own motion. . . .*" (emphasis added). *See e.g., People v. Young*, 814 P.2d 834, 838 (Colo. 1991) ("we have authority on our motion to suspend the rules of appellate procedure in a particular case"); *see also generally, Colorado Ass'n of Pub. Emp. v. D.O.H.*, 809 P.2d 988, 990 n.1 (Colo. 1991). Thus, Mobil's assertion that "[n]either C.A.R. 54(b) . . . nor any other statute or rule of Colorado appellate procedure, authorizes the Colorado Supreme Court to rehear its denial of a petition for discretionary review" (Opp. at 7) is erroneous and moot in any event because the Colorado Supreme Court did entertain the petition for rehearing.

This Court's precedents conclude the jurisdictional issue against Mobil:

> The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.

Bowman v. Loperena, 311 U.S. 262, 266 (1940).[1] In *Pacific Gas & Electric Co. v. Police Court of Sacramento*, this Court wrote:

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[1] *Accord* Stern, Gressman, Shapiro and Geller, Supreme Court Practice, 7th Ed. (1993) at 272, 285 ("[u]nder [U.S. Supreme Court] Rules 13.4 and 30.1, the 90-day filing time period begins to

> At the threshold a motion to dismiss requires to be considered. It is based upon the ground that the court below had, under the state Constitution and laws, no power to review by certiorari the action of the superior court, and therefore that court was the court of last resort competent to decide the cause. But this disregards the fact that the district court of appeal assumed jurisdiction of the cause, and that the supreme court of the state declined to review its judgment for want of jurisdiction. As whether, under the circumstances, the district court of appeal rightfully assumed jurisdiction by certiorari, is a question of purely state law, which we may not review, the judgment of the court of last resort having power to consider the case, and the motion to dismiss is denied.

251 U.S. 22, 40 S.Ct. 79, 64 L.Ed. 112, 117 (1919). *See also, Davis v. Packard*, 33 U.S. 312, 323 (1834) (it is axiomatic that "the court of *dernier* resort in every state decides upon its own jurisdiction"); *Stratton v. Stratton*, 239 U.S. 55, 36 S.Ct. 26, 60 L.Ed. 142, 143 (1915); *Mullen v. Western Union Beef Co.*, 173 U.S. 116, 19 S.Ct. 404, 43 L.Ed. 635, 637 (1898).[2]

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run on the day following . . . an order of a state court of last resort denying discretionary review") ("[T]he filing and pendency of a timely petition for rehearing also render premature the filing of a petition for certiorari in the [U.S.] Supreme Court prior to final action below on the petition for rehearing. . . . If a rehearing is sought in the court below, there is no absolute certainty that the judgment below will not be altered. Only when there is such certainty can the judgment properly be made the subject of a petition for certiorari. And thus it is that the time for petitioning for certiorari commences on the date when certainty and finality attach to the action taken by the lower court. Where rehearing has been sought, that date is the one on which rehearing was denied.") (note omitted).

[2] Mobil asserts that petitioners have omitted to name the Retirement Plan of Mobil Oil Corporation as required by S.Ct. Rule 14.1(b). Opp. at ii and 12 n.14. This contention is also without merit. S.Ct. Rule 14.1(b) requires a list of all parties "unless the names of all parties appear in the caption of the case." All parties

The Colorado Supreme Court had the discretion to consider a petition not expressly authorized by its rules. It had the power to grant rehearing of its order denying certiorari. It entertained the petition for rehearing, and denied it. Until it did so or ruled that it would not entertain the petition, the proceedings below lacked the certainty and finality necessary to commence the 90-day period in this Court. *See also* footnote 1, *supra.*

Mobil's challenge to the timeliness of this petition should be rejected.

II. THE ALLEGATIONS BY PETITIONERS BELOW DETAIL HOW MOBIL USED INFORMATION ABOUT AN ERISA PLAN AS THE "MEANS" TO EFFECT PLAINTIFFS' INVOLUNTARY DISCHARGES, AND PLAINTIFFS' CLAIMS FOR WRONGFUL DISCHARGE, ABSENT A PENSION-DEFEATING OR RETALIATORY MOTIVE, DO NOT "RELATE TO" THE PLAN FOR PURPOSES OF ERISA PREEMPTION.

Petitioners submit that their state law claims for fraudulent discharge are not preempted by ERISA because (a) the Tenth Circuit in *Raymond* previously determined that they have no ERISA case, and (b) the sole connection between plaintiffs' claims and Mobil's retirement plan is that Mobil allegedly used information about the plan as the "means" to effect the discharges. These wrongful discharge claims do not "relate to" the plan, within the contemplation of Congress in enacting ERISA's broad, but not unlimited, preemption clause.

Nowhere in its Brief In Opposition does Mobil address, much less refute, the Tenth Circuit's view in *Raymond* and petitioners' argument here that when information about a pension plan is used merely as the "means"

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appear in the caption of the case as set forth in the appendix. See Pet. at 1a. Mobil has long been informed that petitioners are not pressing any claims against the Retirement Plan.

to procure an employee's discharge, the consequent state law claims for wrongful discharge are not preempted. Betting that this Court will not reconsider the Tenth Circuit's decision in *Raymond* on ERISA standing, Mobil paints this as an ERISA case, highlighting certain allegations in the original complaint:

> —that Mobil "prevented [petitioners] from obtaining a waiver of the threshold for receiving their pension benefits" (Opp. at 9-10);
>
> —that Mobil "cut back on [petitioners'] ERISA Plan rights in violation of the 1984 ERISA amendments" (Opp. at 10); and
>
> —that Mobil "failed to make disclosures about Plan amendments and Plan status" (*id.*).

Certainly, when an employer allegedly uses information about pension plan amendments as the "efficient means" to procure a covered employee's involuntary retirement, the ensuing complaint will necessarily make references to how the employee was manipulated by information about the plan. But that does not mean the case concerns the legality of the amendment under ERISA or that regulation of the Plan under ERISA is implicated. The issue here is the legality of the dissemination of information, under state law, regardless of the content of the information.[3]

Mobil further asserts that petitioners are claiming that Mobil had a " 'pension-defeating or retaliatory motive for

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[3] Mobil argues that "[p]etitioners are barred from recasting their case at this late hour." Opp. at 11 and n.13. This is another attempt to avoid the issue. State law discharge claims are not preempted by ERISA—assuming the Tenth Circuit in *Raymond* is correct—when an employer merely uses information about a plan to effect the discharge. The conduct is entirely outside ERISA unless the discharge itself is cognizable under ERISA, due to a pension-defeating or retaliatory motive, as in *Ingersoll-Rand*. Petitioners' Complaint is focused on their discharges, not on any right, interest or benefit protected by ERISA. That is the essence of the Tenth Circuit's reasoning in *Raymond*.

its conduct,' " Opp. at 10, and that the " 'rights' purportedly violated by Mobil and the Plan were rights to receive a lump-sum pension under the Plan." Opp. at 11. Nowhere do these allegations appear in the complaint. Mobil's assertions clash with the *Raymond* court's holdings and with Mobil's own acknowledgment that petitioners "received all their benefits in a single lump sum" upon retirement. Opp. at 3.

Lastly, Mobil argues that *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990), "rules this case." Opp. at 11. But if *Ingersoll-Rand* rules this case, then petitioners' claims are preempted by virtue of "direct conflict" preemption, which means that *Raymond* should be vacated and petitioners should proceed with claims under ERISA. Again, either *Raymond* was wrong on ERISA or the decision in this case is wrong on preemption. Mobil's arguments do not dispel, but rather underscore, the need for review here —to define the limits of preemption not addressed in *Ingersoll-Rand* and to articulate for the lower courts principles for applying and delimiting ERISA preemption consistent with Congressional intent and regulatory needs.

Petitioners reiterate that with leave of the Court, they are prepared to file a motion to rehear this Court's denial of certiorari to the Tenth Circuit in *Raymond*. The split among the circuits on ERISA standing, represented by *Raymond* and *Christopher*, continues to deepen. *See Adamson v. Armco, Inc.*, —— F.3d ——, 1995 WL 2439 *4 (8th Cir. 01/05/95); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 667-68 (2nd Cir. 1994); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 702-03 (1st Cir. 1994); *see also Harris v. Provident Life & Acc. Ins. Co.*, 26 F.3d 930 (9th Cir. 1994). Even Mobil now acknowledges a serious inter- and intra-circuit conflict on ERISA standing, *see* Opp. at 20 and n.32, which is exacerbated by corresponding conflicts over ERISA preemption in both federal and state courts. *Compare Sanson v. General Motors Corp.*, 966 F.2d 618, 921-23 (11th Cir. 1992);

Cutler v. Phillips Petroleum Co., 881 P.2d 216, 225 (Wash. 1994); *with Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444, 446 (4th Cir. 1993); *Pace v. Signal Technology Corp.*, 628 N.E.2d 20, 22 (Mass. 1994).

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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